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IN THE COURT OF APPEALS OF INDIANA

JACK CHITWOOD, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 53A01-0708-CR-399
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONROE CIRCUIT COURT III
The Honorable Kenneth Todd, Judge
Cause No. 53C03-0608-FB-358

June 26, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Jack Chitwood, Jr. was convicted in Monroe Circuit Court of Class B felony Attempted Burglary and Class D felony resisting law enforcement. Chitwood appeals and claims that the evidence is insufficient to support his convictions. We affirm.

Facts and Procedural History

In the early morning hours of August 1, 2006, an individual called 911 to report that they had heard the sound of breaking glass near a Salvation Army building in Bloomington, Indiana. Among the police dispatched to the scene were Sergeant Canada and Officer Lopossa of the Bloomington Police Department. Sgt. Canada spotted an individual later determined to be Chitwood entering a narrow alleyway behind the Salvation Army building. While Sgt. Canada approached Chitwood from behind, Officer Lopossa went around to the other side of the alleyway. Sgt. Canada observed Chitwood making "forward and backward motions with his . . . right hand" at the main door to the building. Tr. p. 170. Concluding that Chitwood was attempting to break into the building, Sgt. Canada identified himself as a police officer and ordered Chitwood to lie down on the ground. Chitwood instead fled down the alleyway with a knife in his hand, rounded a corner, and ran "very aggressively" at Officer Lopossa. Tr. p. 213. Seeing the knife, Officer Lopossa twice yelled at Chitwood, "drop the knife . . . or I'll shoot you." Id. Chitwood was then pushed from behind by Sgt. Canada, which caused him to drop the knife.

Officer Lopossa and Officer Batcho, who had arrived at the scene, then wrestled Chitwood to the ground and attempted to restrain him. The officers were unable to get Chitwood to place his arms behind his back, even with Sgt. Canada's assistance.

Lopossa struck Chitwood with his flashlight and even sprayed Chitwood with pepper spray, but Chitwood still resisted. Finally, after Officer Batcho struck Chitwood twice with his knee, the officers were able to get Chitwood's arms behind his back and place him in restraints. Chitwood continued to kick at the police as they tried to stand him up.

In the meantime, Officers Werner and Burns had arrived at the scene to assist. Officer Werner searched Chitwood and found two other knives in Chitwood's pockets. Chitwood was then placed in the back of Officer Werner's squad car. Officer Lopossa told Officer Werner to pull his car into a nearby parking lot. Officer Werner opened the rear window of his car, and Officer Lopossa advised Chitwood of his Miranda rights. Chitwood stated that he understood his rights and was willing to talk to the police. Chitwood denied breaking a window but admitted that he was trying to break into the Salvation Army building and had been using the knife to try to pry open some of the doors. When asked why he wanted to enter the building, Chitwood replied, "for money." Tr. p. 260. Chitwood also claimed to be drunk, but Officer Lopossa testified that, although Chitwood smelled of alcohol, he did not appear to be so intoxicated as to impair his abilities. Chitwood was then taken to jail.

Subsequent investigation of the building revealed that the door Chitwood had been seen at had fresh pry marks and indications of an attempt of forced entry. Specifically, twelve fresh groove marks were found scratched on the door through the paint, and the wood frame of the door had been chipped away. A nearby window was also broken.

On August 3, 2006, the State charged Chitwood with Class B felony attempted burglary of a place of religious worship, Class D felony resisting law enforcement, and

further alleged that Chitwood was an habitual offender. The State amended the charges on November 30, 2006, to add an additional count of Class B felony attempted burglary alleging that Chitwood was armed with a deadly weapon. Following a jury trial held on March 20, 2007, Chitwood was found guilty as charged. Chitwood subsequently admitted to being an habitual offender as part of an agreement reached with the State. At a sentencing hearing held on July 25, 2007, the trial court sentenced Chitwood to an aggregate term of twenty-six years incarceration. Chitwood now appeals.

Discussion and Decision

Chitwood claims that the evidence is insufficient to support his convictions. In reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge witness credibility. Kien v. State, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), trans. denied. Instead, we consider only the evidence which supports the conviction along with the reasonable inferences to be drawn therefrom. Id. We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. Id.

Chitwood claims that the evidence is insufficient because "the evidence clearly shows that his statements to the police were involuntarily made . . . ." Appellant's Br. p. 3. Essentially, Chitwood claims that the State could not prove that his confession was voluntary because it was not videotaped or otherwise recorded. Citing to cases and statutes from other jurisdictions which require the videotaping of custodial interrogations, Chitwood urges us to adopt such a requirement ourselves.

Although couched in terms of the sufficiency of the evidence, it is apparent that Chitwood objects to the use of his confession as evidence. As such, Chitwood should have moved to suppress this evidence and, more importantly, made a contemporaneous objection to the use of his statements at trial. This was not done, however, and any objection to the admission of this evidence has not been properly preserved. Brown v. State, 783 N.E.2d 1121, 1125 (Ind. 2003) (failure to make a contemporaneous objection to the admission of evidence at trial, so as to provide the trial court an opportunity to make a final ruling on the matter in the context in which the evidence is introduced, results in waiver of the error on appeal). Even otherwise inadmissible evidence may be considered for substantive purposes, and is sufficient to establish a material fact at issue, when it is admitted without a contemporaneous objection at trial. Banks v. State, 567 N.E.2d 1126, 1129 (Ind. 1991); Moss v. State, 165 Ind.App. 502, 507, 333 N.E.2d 141, 144 (Ind. Ct. App. 1975), trans. denied.

Moreover, if Chitwood had contemporaneously objected to the use of his confession at trial, it would have been to no avail. Chitwood recognizes that this court has previously held:

> [A]lthough we impose no legal obligation, we discern few instances in which law enforcement officers would be justified in failing to record custodial interrogations in places of detention. Disputes regarding the circumstances of an interrogation would be minimized, in that a tape recording preserves undisturbed that which the mind may forget. In turn, the judiciary would be relieved of much of the burden of resolving disputes involving differing recollections of events which occurred. Id. Moreover, the recording would serve to protect police officers against false allegations that a confession was not obtained voluntarily. Id. at 1162. Therefore, in light of the slight inconvenience and expense associated with the recording

> of custodial interrogations in their entirety, it is strongly recommended, as a matter of sound policy, that law enforcement officers adopt this procedure.

Stoker v. State, 692 N.E.2d 1386, 1390 (Ind. Ct. App. 1998) (citations and footnotes omitted).

Thus, although we have strongly recommended the recording of custodial interrogations in places of detention, the failure to record an interview does not make any statements obtained involuntary or otherwise inadmissible. See id. ("we hold that Article One, Section Twelve of the Indiana Constitution does not require law enforcement officers to record custodial interrogations in places of detention."); see also Gasper v. State, 833 N.E.2d 1036, 1041 (Ind. Ct. App. 2005) (declining to impose a constitutional requirement to record custodial interrogations in places of detention, but again strongly encouraging law enforcement officers to record all custodial interrogations), trans. denied; Whitfield v. State, 699 N.E.2d 666, 669 (Ind. Ct. App. 1998) (recognizing that this court had already held that failure to record entire interrogation does not deprive criminal defendant of rights secured under the Indiana Constitution), trans. denied; Callis v. State, 684 N.E.2d 233, 240-41 (Ind. Ct. App. 1997) (holding that failure to tape record defendant's non-custodial post-polygraph interviews did not violate due process rights under the Indiana Constitution), trans. denied.

We decline any invitation to reject this well-accepted rule of law. If there is a change to be made in this regard, it is a change to be made by either our Supreme Court or General Assembly. We therefore conclude that even if Chitwood had properly

preserved any challenge to the admission of his confession, such a challenge would not have been successful.

The evidence which favors the jury's verdict, and the reasonable inference drawn therefrom, sufficiently supports Chitwood's convictions. A police officer directly witnessed him attempting to pry open a door to the Salvation Army building. When ordered to stop, Chitwood fled. Chitwood forcibly resisted arrest, and it took three officers to subdue him. After being placed in custody, Chitwood was Mirandized and stated that he understood his rights but was still willing to speak to the police. Chitwood then admitted that he had been trying to break into the Salvation Army building to get money. From this, the jury could readily conclude that Chitwood, while armed with a deadly weapon, engaged in conduct that constituted a substantial step toward the breaking and entering of a building used for religious worship with the intent to commit the felony of theft therein. See Ind. Code § 35-43-2-1 (2004) (defining burglary as a Class B felony); Ind. Code § 35-41-5-1 (2004) (defining attempt). Chitwood's arguments are nothing more than an invitation for this court to reweigh the evidence, determine the credibility of witnesses, and come to a conclusion different than that reached by the trier of fact. This we will not do.

Affirmed.

MAY, J., and VAIDIK, J., concur.